

SERVED: April 12, 1994

NTSB Order No. EA-4134

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 25th day of March, 1994

DAVID R. HINSON,
Administrator,
Federal Aviation Administration,

Complainant,

v.

Dockets SE-11488 and
SE-11489

PAUL C. HEIMERL and
DAVID M. FORREST,

Respondents.

ORDER DENYING PETITION FOR RECONSIDERATION

On review of respondents' petition for reconsideration of Board Order No. EA-4014 (served November 18, 1993) and the Administrator's reply in opposition, we have concluded that the petition simply renews arguments previously considered and rejected and, thus, that the disagreement the petition registers with respect to our original judgment does not establish error in, or otherwise present a basis for altering, it.

6169A

ACCORDINGLY, IT IS ORDERED THAT:

The petition for reconsideration is denied.¹

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above order. Chairman VOGT and Vice Chairman COUGHLIN submitted the following concurring statement.

'The Administrator, in addition to opposing the petition, has renewed a motion to dismiss respondents' appeal as untimely that we did not rule on in connection with our decision on the merits. The motion to dismiss is denied. We have previously accepted as timely an appeal brief whose certificate of service reflected a mailing on the brief's due date, even though the envelope in which it was sent bore a postmark with a later date, See Administrator v. Rivers, NTSB Order No. EA-3753 (1992) at p. 2, n. 2; compare, Administrator v. Prero, NTSB order No. EA-3301 (1991) (Unexplained difference between certificate of service, not signed by counsel, and Board's date of receipt, where no postmark for notice of appeal was available, of almost a month warranted rejection of certificate date for purposes of determining timeliness of appeal). We see no reason in this case, where the 3-day disparity in dates suggested a Monday pickup of a brief posted on a Friday, to attempt to define the boundaries of our procedural ruling in Rivers, which reflects a judgment that a party's authorized service of a document by mail is adequate and complete when it is placed, pursuant to accompanying certification as to date, in a mail box, without regard to the Postal Service's pickup schedule for that location. If that policy leads to abuse, as the Administrator appears to be concerned could occur, we will re-examine it in an appropriate case. In the meantime, we are not persuaded that insignificant disparities, namely, those involving no more than a few days, should be viewed as raising any issue concerning the accuracy of the certificate of service, such that further inquiry might be warranted.

Administrator. Heimerl and Forrest
Notation No. 6169A
Concurring statement of the Chairman and Vice-chairman

We agree that respondent's petition for reconsideration and the Administrators motion to dismiss respondents' appeal as untimely should both be denied. Regarding the latter, our rules explicitly state that "[w]henever proof of service by mail is made, the date of service shall be the mailing date shown on the certificate of service." 821 C. F. R § 821.8 (h).

However, in our view the Board's service rule does not encourage the timely posting of documents, and affords the opportunity for post-dating a document which is past due. With no intent to imply impropriety on the respondents' part, it is undisputed that their appeal brief was postmarked three days after it was due but, because of the date on the certificate of service, it was timely under Rule 8(h). We urge the Board to adopt a different rule for calculating the date of service, such as the date the document was placed in the U.S. mail.

C.W.V.

S.M.C.

3/25/74